No. 83-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITOL HILL DODGE, INC., *et al.*,
Petitioners,

v.

CHRYSLER CREDIT CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in its unanimous per curiam affirmance of the District Court's opinion, based on facts in the record developed after two evidentiary hearings, holding that the parties entered in a valid settlement of respondent's diversity suit?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT RULE 17

Considerations Governing Review On Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so

far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

I. Introduction

Petitioners in this case, Capitol Hill Dodge, Inc., a former automobile dealership, and Elliot Denniberg, its Vice President, principal officer, and guarantor for the dealership's indebtedness, sold automobiles financed by Chrysler Credit Corporation without subsequently repaying Chrysler Credit for them. Their failure to repay was a breach of the trust receipts executed by Capitol Hill Dodge ("Capitol Hill", "Dealer" or "Dealership"), which required the Dealer to repay Chrysler Credit monies advanced for the purchase of vehicles. Upon petitioners' unfulfilled promises of repayment and unsuccessful recapitalization efforts, Chrysler Credit

brought the underlying suit in August, 1979, resulting in a temporary injunction of further car sales by petitioners. Ongoing negotiations between the parties resulted in a Settlement Agreement letter executed August 30, 1979 and stipulated to by court order August 31, 1979.

In the present litigation, Elliot Denniberg has attempted to renege on the Settlement Agreement by claiming that Chrysler Credit coerced him -- despite his consulting two attorneys prior to signing the Agreement -- into settling their differences. When Chrysler Credit moved to specifically enforce the Agreement, settlement terms not having been met, Denniberg retained new counsel and opposed the motion.

After two evidentiary hearings, the case having been remanded for further testimony and legal analysis, the Honorable John Penn, District Judge, held that the settlement was valid and should be enforced, on the grounds that Denniberg entered into the settlement on behalf of himself and the Dealership without duress, without mistake, and with an intent to make an unconditional promise to pay.

In upholding the validity and enforceability of the Settlement Agreement on the entire record before him, Judge Penn followed and applied authoritative precedents of the District of Columbia Court of Appeals and the U.S. Court of Appeals for the District of Columbia Circuit. Judge Penn reached his holding on

the basis of facts derived at least in part from Denniberg's own statements and contemporaneous documents.

On appeal, after full briefing and oral argument, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit, consisting of Circuit Judges Wright, Wald and Edwards, affirmed per curiam. After giving the issues on appeal full consideration, the Court stated that the District Court's orders were "affirmed for the reasons stated in those Orders and in the Memorandum Opinion" and remanded the case to the District Court "with instructions to retain jurisdiction of this matter until the amount owed by the appellants under the settlement agreement is liquidated and the settlement agreement is fully performed". Petitioners sought

rehearing and filed a suggestion for rehearing en banc. Both were unanimously denied, not a single member of the full Court requesting that a vote be taken on the suggestion for a rehearing en banc. (Orders denying rehearing and rehearing en banc October 13, 1983).

Petitioners have now reached the end of the line in their obdurate evasion of the duties encompassed in the August 30, 1979 Settlement Agreement. Not only is the Settlement Agreement valid and enforceable, as every judge who has considered the case agrees, but the question tendered to this Court is of the most narrow, limited, and localized scope, involving the application of District of Columbia law on contracts to a particular diversity case.

II. Background Of The Lawsuit

The relevant facts about the background of Denniberg's failure to abide by the Settlement Agreement are established by Denniberg's own statements and the statements of witnesses. The District Court documented the material facts in specific findings in its Memorandum Opinion of November 29, 1982.

Denniberg, an independent businessman, became a partner in Capitol Hill Dodge. He individually signed a Continuing Guaranty with Chrysler Credit October 11, 1978. (Pet. A-13, A-19.)[1/] Denniberg and Capitol Hill then executed wholesale promissory

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[1/] The opinion and judgment below are contained in appendices to the Petition and will be cited as Pet. App. _____. The Petition will be cited as Pet. ____.

notes and trust receipts, obligating them to repay Chrysler Credit monies advanced for the purchase of vehicles. (Pet. App. A-20.)

Prior to taking over active management of Capitol Hill Dodge, Denniberg knew that the Dealership was on financial hold. (Pet. App. A-25.) In June 1979, he took over active management of Capitol Hill from his partner Glen Covey, despite knowing of its financial troubles and despite being advised by Chrysler Credit to avoid taking over management. (Pet. App. A-24, A-25.) In July 1979, he freely put $50,000 into the Dealership. (Pet. App. A-25.) While actively managing Capitol Hill in mid-summer of 1979, Denniberg requested factory inventory, even though knowing that the Dealership was out-of-trust and unable to

repay $141,000, the amount then owed to Chrysler Credit on cars sold. (Pet. App. A-25, A-30.)

Chrysler Credit learned July 10, 1979 that petitioners had sold vehicles without repaying amounts financed, and demanded repayment without success. (Pet. App. A-20.) After July 10, 1979, Chrysler Credit took the certificates of origin for vehicles it had financed for Capitol Hill. It was understood that these certificates were to be released to the Dealership upon repayment of the proportionate amount borrowed when a vehicle was sold. (Pet. App. A-25, A-26.)

Petitioners were unable to repay Chrysler Credit as required to obtain the certificates of origin. (Pet. App. A-20, A-24.) Sometime after August 10, 1979,

Benton of Chrysler Credit told Denniberg that he could go to jail for not releasing certificates of origin to purchasers, explaining that he was referring to rights of customers to take action. (Pet. App. A-15.)

Chrysler Credit filed suit in August 1979 for breach of the trust agreements, and the trial court entered a temporary restraining order on August 17, 1979 enjoining petitioners from selling vehicles. On August 30, 1979, Denniberg and Chrysler Credit executed a Settlement Agreement which was "to fully and finally amicably resolve all of the issues which were or could have been raised" in this suit. (Pet. App. A-20, A-21.) Prior to

signing this Agreement, Denniberg consulted extensively with two attorneys. (Pet. App. A-14-A-18; A-27.)

The Court approved a Stipulation and Order August 31, 1979, whereby the TRO was dissolved, the proceedings stayed until September 17, 1979 in order to allow the Agreement to be performed, and petitioners became obligated to return financed vehicles to respondent and to execute a "voluntary return of assets letter". (Pet. App. A-5, A-21.) During this time, Denniberg tried unsuccessfully both to raise the settlement funds and to compromise the amount owed. (Pet. App. A-28.)

Paragraph 5 of the Settlement Agreement required Chrysler Credit to audit the Dealership's inventory within 10 days.

Chrysler Credit did so August 31, 1979, at which time petitioners' office manager prepared her own listing as well. Denniberg knew of the results of respondent's audit and his office manager's tally before September 10, 1979, and received a written copy of respondent's audit on October 22, 1979. Denniberg neither paid the sum reflected by his own audit nor verified Chrysler's audit. (Pet. App. A-29, A-30.)

III. The Opinions Of The District Court

The parties have agreed throughout the litigation that local, District of Columbia law is applicable in this diversity action. The parties have not disputed that the sole jurisdictional basis for the breach of

contract action was diversity of citizenship and the question was solely one of D.C. law, the trial court's task being to determine the application of D.C. law to the enforceability of the Settlement Agreement. (See Pet. App. A-8, A-19, A-31.)

Judge Penn proceeded to do just that, analyzing the relevant precedents in District of Columbia common law as applied by the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia Court of Appeals. On January 14, 1980, Judge Penn entered judgment for respondent and ordered specific enforcement of the Settlement Agreement. Upon petitioners' appeal, the U.S. Court of Appeals for the D.C. Circuit vacated the January 14, 1980 Order and remanded the case for the taking

of further testimony and for the District Court to reach explicit conclusions on all four substantive defenses raised by the petitioners. (Pet. App. A-22, A-23.) Accordingly, on remand Judge Penn entertained additional testimony and thoroughly explained the Court's conclusions on each of petitioners' four substantive defenses. He again ordered specific enforcement of the Settlement Agreement and entered judgment in respondent's favor. (Pet. App. A-23, A-4-A-37.)

In reaching the appropriate conclusions regarding petitioners' four defenses, Judge Penn concluded, explicitly and implicitly, that the governing precedents of the U.S. Court of Appeals for

the D.C. Circuit and the District of Columbia Court of Appeals were entirely consistent.

First, Judge Penn found that Denniberg was not deprived of the exercise of his free will and judgment and that the alleged "duress" was not persuasive; relying on Sind v. Pollin, 356 A.2d 653, 656 (D.C. 1976) ("any threat...that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment"). No decision of the D.C. federal courts has been found which conflicts with the Sind holding.

Judge Penn also found that Denniberg showed intent to perform after discovery of the relevant facts, and thus was untimely in seeking to rescind the Settlement

Agreement. Judge Penn relied on Williams v. Amann, 33 A.2d 633 (D.C. 1943) and Horning v. Ferguson, 52 A.2d 116 (D.C. 1947) (one who seeks to rescind a contract for duress or fraud in the inducement must elect to rescind or perform after discovery of facts justifying rescission, and if electing to perform, makes a new contract). These cases are consistent with the law of the D.C. Circuit Court of Appeals. See Mariner Water Renaturalizer of Washington, Inc. v. Aqua Purification Systems, Inc., 665 F.2d 1066 (D.C. Cir. 1981) (Under District of Columbia law, one who seeks to rescind a contract must act within reasonable time after discovery of facts justifying rescission).

Second, the District Court found unpersuasive the defense that Denniberg lacked intent to contract. In reaching this conclusion, Judge Penn relied on consistent federal and local decisions. Bergman v. Parker, 216 A.2d 581, 583 (D.C. 1966) (intentions of the parties to a contract are to be determined by both the words of their agreement and their actions); Autera v. Robinson, 419 F.2d 1197 (D.C. Cir. 1969) (settlement agreements are highly favored by the law and are to be enforced under the general rules of contract law).

Third, the District Court found the defense of nonfulfillment of a condition precedent legally inadequate. Judge Penn relied on Bergman v. Parker, 216 A.2d 581, 583 (D.C. 1966) for the rule that a

condition precedent, as distinguished from a promise, is a fact, other than the passage of time, which must exist before a duty of immediate performance of a promise can arise. Bergman is consistent with Emersons, Ltd. v. Max Wolman Co., 388 F.Supp. 729, aff'd 530 F.2d 1093 (D.D.C: 1975) (courts traditionally refuse to interpret ambiguous conditions in contracts as "conditions precedent").

Fourth, the District Court rejected the defense that Denniberg's unilateral mistake nullified the Settlement Agreement. Finding no mistake as to any material portion of the Agreement, Judge Penn relied on 13 Williston on Contracts Section 1544 (3d ed. 1970) for the proposition that in order for uni-lateral mistake to warrant rescission of a contract, it must relate to

a material part of the contract and be so serious as to make enforcement of the contract unconscionable. No decision of the D.C. courts, whether local or federal, has been found which conflicts with Williston on this point.

Petitioners are flatly incorrect in stating that Judge Penn "abused [his] discretion by erroneously ignoring all evidence of duress, coercion and fraud", and that he "failed to perceive and understand that economic pressure, poor business conditions and threats of criminal prosecution do constitute duress and coercion." (Pet. 21.) Judge Penn did no such thing, as his opinion makes clear. He stated that "[a]fter carefully considering the evidence in this case, including the testimony of Denniberg, Benton, Paul Smith-

and Stephen Friedman, Denniberg's attorney, the Court finds no evidence to support the defendant's claim of duress". (Pet. App. A-13.) He accounted for the testimony of Paul Smith, as directed to by the D.C. Circuit Court of Appeals, specifically finding that despite the alleged threats made against him, Smith refused to sign an agreement with Chrysler Credit. (Pet. App. A-27, A-28.) He also specifically found that no agent of Chrysler Credit threatened to put Denniberg in jail, Benton having explained to Denniberg that his criminal exposure was in reference to rights of customers to take action, and that his best recourse was to seek legal advice. (Pet. App. A-14-A-16, A-23, A-26, A-32.) Judge Penn further found that the only other specific allegations of fraud and

duress concerned economic pressure, and since that the evidence showed that the economic pressure was of Denniberg's own making, proof of duress was inadequate as a matter of law. (Pet. App. A-14, A-24, A-32, A-36.)

Petitioners are further incorrect in making other unfounded and loose-ended assertions that are not even correlated to the factual findings of Judge Penn. For example, petitioners posit that no mutually agreed upon figure has ever been calculated for the audit of their inventory, and that it is presently impossible to audit or verify what the inventory was in August 1979. They further state that no credible evidence is before the District Court from which a calculation can be made. (Pet. 25.)

In contrast, Judge Penn found that (1) the petitioners knew that both the respondent and the petitioners' office manager performed audits, (2) petitioners knew of the figures resulting from both audits prior to September 10, 1979, and (3) the petitioners took no action to pay the sum reflected in their own audit or to verify the respondent's figures. (Pet. App. A-29, A-30.) On the basis of these findings, Judge Penn held that petitioners, upon receipt of respondent's written audit on October 22, 1979, became obligated to verify and then pay the amount reflected in respondent's audit. (Pet. App. A-34, A-35.)

Petitioners also state with no foundation whatsoever that "Chrysler Credit further exhibited a willingness to inflect

duress and coercion by its apparent offering of a dealership to Defendants' witness, Paul Smith, if he did not testify on behalf of Defendant Denniberg". (Pet. 21.) This is nothing more than brazen speculation, devoid of any basis in fact or in the record.

Suffice it to say that with regard to the evidentiary rulings in this case, petitioners' scatter-shot approach does not even address the application of the clearly erroneous standard which must be applied to Judge Penn's decision. Pullman-Standard v. Swint, 456 U.S. 305, 313 (1982) (a trial court's factual findings may not be set aside unless clearly erroneous). The petitioners are wrong to reargue the facts at this late date; there simply is no basis in the record or in their arguments from

which this Court could conclude with certainty that Judge Penn erred on the facts.

In sum, the District Court held, on the basis of Denniberg's own statements and admissions, the statements of other witnesses, and relevant documents, that petitioners entered into a valid and enforceable settlement of this action, voluntarily and without duress.

IV. The Court of Appeals Decision

The unanimous per curiam affirmance by the Court of Appeals, J.J. Wright, Wald and Edwards, was rendered after extensive briefing by the parties, oral argument and full consideration by the Court. (Pet. App. 1.) In affirming the decision below,

the Court relied upon its Local Rule 13(c), which allows the Court to dispense with written opinions in appropriate cases.

The Court, after reviewing the District Court's opinion and the extensive record on appeal, concluded that the District Court had properly applied the governing principles in its disposition of petitioners' case. No question of general applicability was discerned by any member of the panel, nor did any of the ten active judges of the full Court even request a vote on the suggestion for rehearing en banc.

REASONS FOR DENYING THE WRIT

None of the criteria enumerated by this Court (see Supreme Court Rule 17) for discretionary review on certiorari of the decision of a federal court of appeals is remotely approached here. The narrow and particularized question of local law application involved here does not warrant consideration by this Court.

1. Petitioners do not assert that this case involves a conflict of circuits. No such conflict could arise, since the issue is only the application of D.C. common law on contracts to a case brought in the District of Columbia.

Nor is there a conflict as to a question of federal law asserted between the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia Court

of Appeals. To the contrary, the decisions of these two courts are entirely consistent. The decision of the U.S. Court of Appeals upholding Judge Penn's decision, relying extensively on precedents of the District of Columbia Court of Appeals, means that there is uniformity and consistency between the local and federal courts in the District of Columbia in interpreting this aspect of D.C. law, just as there should be.

2. There is no important question of federal law here requiring settlement by this Court. Indeed, there is no question of federal law of general applicability in the federal system, much less any issue of importance. The only issue relates to the application of D.C. common law on contracts to a particular lawsuit. There was no

federal constitutional issues addressed by the Courts below. There are no conflicts of authority at all, much less a conflict with any applicable decision of this Court.

This Court has consistently adhered to the principle that decisions on issues of such localized character by the courts of the District of Columbia do not merit review by this Court. As the Court stated in Pernell v. Southall Realty, 416 U.S. 363, 366 (1974):

> "This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application."

That this case involves no issue of general importance was recognized by the Court of Appeals when it implicitly decided that the issues presented occasioned no need for an opinion in accordance with its Local Rule 13(c).

3. There is no need to reargue here the correctness of Judge Penn's decision or that of the Court of Appeals affirming it. Suffice it to say that Judge Penn gave all parties a full and fair opportunity to be heard; he dealt comprehensively and carefully with each of petitioners' contentions; he analyzed the controlling legal authorities and carefully applied them to the issue before him; and a Court of Appeals of wide experience unanimously agreed that his decision was so clearly correct as not even to require discussion

in an opinion. The case was fair and efficient in decisionmaking at both the trial and appellate levels, and every judge who has scrutinized the issue has come to the same conclusion that petitioners voluntarily entered into and valid and specifically enforceable settlement Agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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